

HENG GEK KIAU

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v.

GOH KOON SUAN

COURT OF APPEAL, PUTRAJAYA

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GOPAL SRI RAM JCA

ZAINUN ALI JCA

HASAN LAH JCA

[CIVIL APPEAL NO: J-02-422-2001]

6 JULY 2007

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TRUSTS: *Resulting trust - Purchase of property in the name of mistress - Whether property held on a resulting trust - Whether property intended as gift - Whether presumption of advancement applicable*

TRUSTS: *Resulting trust - Presumption - Applicability - Whether presumption applies only if true intention of parties cannot be inferred*

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The plaintiff (the respondent herein) commenced an action against the defendant (the appellant herein) to recover a house he had purchased in the defendant's name. The defendant was the plaintiff's mistress and the couple had a child. The learned judge ruled in favour of the plaintiff. Hence, the defendant's appeal.

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Held (allowing the appeal)

Per Gopal Sri Ram JCA:

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(1) The court should first determine the true intention of the purchaser. The question whether the purchaser had a donative intention is to be determined objectively through a meticulous examination of the facts and evidence of the surrounding circumstances. If after such an examination the court concludes that there is a donative intention on the part of the purchaser, then the presumption of resulting trust or advancement is not applicable. It is only where there are no or insufficient facts or evidence from which a fair inference of intention may be drawn that a court should turn to presumptions as a last resort to resolve the dispute. The presumption of resulting trust operates only where there is no evidence as to the true intention of the parties. (paras 7 & 8)

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(2) The real intention of the plaintiff might be deduced from the following circumstantial evidence. Firstly, although the plaintiff provided the purchase price, he not only registered the

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- A property in the defendant's name but also permitted her to occupy the house. Secondly, the plaintiff allowed the defendant to deal with the house as if she was the beneficial owner. Thirdly, at no time did the plaintiff inform the solicitors who attended to the purchase of the property that the
- B defendant was the mere nominal owner of the house and that he was the true beneficial owner. Fourthly, the evidence showed that the reason given by the plaintiff for purchasing the property for investment purposes was highly improbable. It followed that the combined strength of the circumstantial
- C evidence above were sufficient to support a probable inference of a donative intention on his part. (paras 12 & 13)
- (3) The High Court did not sufficiently adduce itself to the salient facts. It did not direct itself to the probabilities of the case. Nor did it test each party's case against those probabilities.
- D This was a case in which there was clearly a want of judicial appreciation of the evidence by the trial court thereby warranting appellate intervention. Even if the learned judge's approach was correct, the presumption of resulting trust was rebutted by the evidence alluded to. (paras 14 & 15)
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- (4) The case of *Soar v. Foster* should not be followed. The learned judge relied on that case to find that the presumption of advancement did not apply in the defendant's favour as she was a mistress. That case was decided in 1858 and Terrell Ag
- F CJ in *Dharmaratna v. Dharmaratna* doubted whether it should be followed. However, *Soar v. Foster* extended the application of the presumption to illegitimate children. The presumption should now be extended to mistresses. It followed that *Soar v. Foster* in so far as it refused to extend the presumption of
- G advancement to mistresses was no longer good law and the views of Terrell Ag CJ in *Dharmaratna v. Dharmaratna* were preferred. (paras 18 & 20)

Bahasa Malaysia Translation Of Headnotes

- H Plaintiff (responden di sini) memulakan tindakan terhadap defendan (perayu di sini) untuk mendapatkan kembali sebuah rumah yang beliau beli dengan menggunakan nama defendan. Defendan adalah perempuan simpanan plaintiff dan mereka mempunyai seorang anak.
- I Yang arif hakim memutuskan dengan berpihak kepada plaintiff dan defendan merayu.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR:

- (1) Mahkamah harus terlebih dahulu memutuskan niat sebenar pembeli. Persoalan sama ada pembeli mempunyai niat menghadaiah perlu diputuskan secara objektif melalui pemeriksaan teliti fakta-fakta dan keterangan-keterangan sekeliling. Sekiranya, selepas pemeriksaan ini dibuat, mahkamah memutuskan bahawa wujud suatu niat menghadaiah di pihak pembeli, maka anggapan amanah berbangkit atau pemberian tidak terpakai. Hanya dalam keadaan di mana tidak terdapat fakta atau keterangan, atau fakta atau keterangan yang mencukupi dari mana suatu inferens niat yang munasabah boleh dibuat, barulah mahkamah boleh membuat anggapan sebagai langkah terakhir untuk menyelesaikan pertikaian. Anggapan amanah berbangkit hanya beroperasi di mana tidak terdapat keterangan mengenai niat sebenar pihak-pihak. A
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- (2) Niat sebenar plaintif boleh diandaikan dari keterangan-keterangan ikut keadaan berikut. Pertama, walaupun plaintif menyediakan harga belian, beliau bukan sahaja mendaftarkan hartanah atas nama defendan tetapi juga membenarkan defendan menduduki rumah tersebut. Kedua, plaintif membenarkan defendan menguruskan rumah seolah-olah defendan adalah pemilik benefisialnya. Ketiga, plaintif tidak pernah memberitahu peguamcara yang menguruskan pembelian hartanah bahawa defendan hanyalah pemilik nominal rumah tersebut dan bahawa dirinya adalah pemilik benefisial sebenar rumah. Keempat, keterangan menunjukkan bahawa alasan yang diberikan plaintif bahawa pembelian hartanah adalah untuk pelaburan adalah amat tidak munasabah. Ianya mengikut bahawa ikatan keterangan ikut keadaan pada keseluruhannya adalah mencukupi untuk menyokong inferens niat menghadaiah di pihak plaintif. E
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- (3) Mahkamah Tinggi tidak menilai sepenuhnya fakta-fakta penting yang wujud. Ia tidak mengarahkan dirinya kepada kemungkinan-kemungkinan di dalam kes. Begitu juga, ia tidak menguji kes setiap pihak kepada kemungkinan-kemungkinan tersebut. Ini adalah satu kes di mana terdapat kegagalan jelas untuk membuat penilaian kehakiman terhadap keterangan-keterangan oleh mahkamah bicara sekaligus mewajarkan campuran peringkat rayuan. Jikapun pendekatan yang arif hakim itu betul, anggapan amanah berbangkit telah disangkal oleh keterangan-keterangan yang dikatakan. H
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- A (4) Kes *Soar v. Foster* tidak harus diikuti. Yang arif hakim bergantung kepada kes tersebut untuk memutuskan bahawa anggapan pemberian tidak terpakai untuk manfaat defendan disebabkan beliau seorang perempuan simpanan. Kes itu diputuskan pada tahun 1858 dan Terrell Ag CJ di dalam
- B *Dharmaratna v. Dharmaratna* menyatakan kesangsian sama ada ia boleh diikuti. Bagaimanapun, *Soar v. Foster* memanjangkan pemakaian anggapan tersebut kepada anak-anak luar nikah. Anggapan tersebut kini sepatutnya dipanjangkan juga kepada perempuan-perempuan simpanan. Ianya mengikut bahawa *Soar v. Foster* setakat mana ia enggan memanjangkan anggapan pemberian kepada perempuan-perempuan simpanan sudah tidak menjadi undang-undang yang dipakai dan pandangan Terrell Ag CJ di dalam *Dharmaratna v. Dharmaratna* haruslah diutamakan.
- C
- D **Case(s) referred to:**
Belhaven & Stenton Peerage Case [1875] 6 App Cas 279 (*refd*)
Berry v. British Transport Commission [1961] 3 All ER 65 (*refd*)
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC (*refd*)
Cooke v. Head [1972] 2 All ER 38 (*refd*)
- E *Dharmaratna v. Dharmaratna* [1939] 1 LNS 21 HC (*refd*)
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC (*refd*)
Goh Koon Suan v. Heng Gek Kiau [1990] SLR 1251 (*refd*)
Kyriakides v. Pippas [2004] EWHC 646 (*refd*)
Pettitt v. Pettitt [1970] AC 777 (*refd*)
- F *Ryan v. Jarvis* [2005] UKPC 27 (*refd*)
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA (*refd*)
Sahdeo Karan Singh v. Usman Ali Khan AIR [1939] Patna 462 (*refd*)
Soar v. Foster [1858] 70 ER 67 (*refd*)
Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669 (*refd*)
- G **Legislation referred to:**
 Civil law Act 1956, s. 3
- Other source(s) referred to:**
 SK Das, *The Torrens System in Malaya*, p 192
- H *For the appellant/defendant* - PK Nathan; M/s Gana Muthusamy & Co
For the respondent/plaintiff - Wong Kian Kheong (Alex Tan with him);
 M/s Wong Kian Kheong
- I [Appeal from High Court, Johor Bahru; Civil Suit No: 22-286-1990]
 Reported by Usha Thiagarajah

JUDGMENT**Gopal Sri Ram JCA:**

[1] This appeal concerns the issue of the presumptions that arise in equity when property is purchased in the name of another. The parties to this appeal are a man and a lady. They are not husband and wife. The lady is what lawyers refer to as a “common law wife”, an expression that perhaps sounds better than “mistress”. But in truth that is what she was – the plaintiff’s mistress. The lady is the defendant; the man the plaintiff. The property in question is a dwelling house in Johor Bahru. It was bought and paid for by the plaintiff, a multi-millionaire. He paid RM61,000 for it. He had it registered in the defendant’s name. The defendant lived in it. Later, the plaintiff sued to recover the house. He succeeded in the High Court. The defendant appealed to us. We allowed the appeal. The reasons for our decision are now produced.

[2] First the facts. The relationship between the parties dates back to the late 1960’s when the plaintiff met the defendant in Singapore. She was a mere child – in her late teens. He was in his thirty’s: a successful businessman no doubt equipped with all the wiles that go to make one successful in the world of commerce. He became infatuated by her beauty and obvious innocence. She was an illegal immigrant from Indonesia. Because of her youth and her status she was most vulnerable. The plaintiff took full advantage of that vulnerability. He was a married man. So, he made the defendant his mistress. She could not remain in Singapore because of her status as an illegal immigrant. Yet he did not want to lose her. He found a way. He convinced her to marry her relative – a Malaysian in Johor – to enable her to obtain residence status in Malaysia. That marriage, which was contracted in 1976, was a sham. But it fully served the plaintiff’s purpose.

[3] The relationship between the plaintiff and the defendant went on for many years. A child was born. However, from about 1984 onwards, the relationship began to sour. In 1988 the plaintiff demanded of the defendant that she transfer the house to him. She refused. The plaintiff then commenced proceedings both in Malaysia and Singapore. The latter proceedings were in respect of a property in Singapore which had been purchased by monies largely provided by the plaintiff but of which the defendant was the owner at law. The course those proceedings took may be

- A found in [1990] SLR 1251. In the action that forms the subject matter of the instant appeal the plaintiff's case for the recovery of the house was as follows: (i) he provided the purchase price of the subject property; (ii) the defendant is neither his wife, child nor someone to whom he stood in *loco parentis* at the material time; (iii) the defendant therefore held the subject property upon a resulting trust in his favour and hence had no beneficial interest whatsoever in it. These contentions were accepted by the learned judge. Judgment was accordingly entered against the defendant and her counterclaim was dismissed.
- C [4] In arguing the appeal learned counsel for the defendant invited us to disturb the learned judge's finding that the plaintiff had provided the purchase price for the subject property and to hold that the defendant had also contributed to the purchase price. We must decline the invitation. This issue – as to who provided the purchase price – is one of fact depending upon the credibility of the witnesses who testified at the trial. In accordance with well settled principles we will not interfere with his findings because – to paraphrase less elegantly the words of Lord Hoffmann in *Ryan v. Jarvis* [2005] UKPC 27 – the true or false note in the ring of the evidence would have been more audible to the judge who enjoyed the audio-visual advantage at first instance than we who are confined to the printed record.
- F [5] But the same approach does not hold when it comes to the drawing of inferences from the proved or admitted primary facts. And where there is insufficient judicial appreciation by a trial court of the evidence of circumstances placed before him appellate intervention will more readily occur. See, *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309.
- H [6] In the present instance the learned judge, after an admirable summary of the evidence, proceeded at once to the equitable presumption of a resulting trust. He held that since the defendant was not a member of the class in whose favour a Court of Equity rebuttably presumes an advancement by the donor, she held the house on a resulting trust for the plaintiff. This is how he put it:
- I There was a striking feature in the present case. It was a striking factor that propelled it ahead and made it a difference from all the other cases. It was this. The relationship between the plaintiff and the defendant was a relationship between a rich married man and a beautiful but poor mistress. On the evidence and the pleadings,

that relationship can never be denied. In fact it was not disputed at all. It is germane to mention that the plaintiff's assertion in examination-in-chief that the defendant was his mistress was left unchallenged. Thus, the presumption of advancement which arises when a man buys property in the name of his wife does not and cannot arise in the present case. As Chua J observed in *Chua Cheow Tien v. Chua Geok Eng & Anor* [1968] 2 MLJ 180 especially at p. 185 of the report:

The settled law is that if A buys property in the name of B, who is no relative, B is held to be trustee of that property for A but if B is a child or a wife of A no such trust is presumed and the law presumes that the legal and beneficial ownership is in the child or the wife so that the onus is on those who seek to rebut the presumption and establish an absolute trust for the father.

Now, since the defendant was not the child nor the wife of the plaintiff, the presumption that arises and should arise would be not one of advancement in favour of the defendant but rather one of trust in favour of the plaintiff. The onus therefore shifted to the defendant to rebut the presumption of trust.

The learned judge then went on to hold that the defendant had failed to rebut the presumption of resulting trust.

[7] With respect, we are unable to agree with the approach adopted by the learned judge. In our judgment the correct approach in cases such as the present is for a court first to determine the true intention of the purchaser. The question whether the purchaser in a particular case had a donative intention is to be determined objectively through a meticulous examination of the facts and evidence of the surrounding circumstances. If after such an examination the court concludes that there was a donative intention on the part of the purchaser that is the end of the matter and there is no room for the operation of the presumption of resulting trust or advancement as the case may be. It is only where there are no or insufficient facts or evidence from which a fair inference of intention may be drawn that a court should turn to presumptions as a last resort to resolve the dispute. As Devlin LJ observed in *Berry v. British Transport Commission* [1961] 3 All ER 65, 75:

... presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable ... because they prevent the court from ascertaining the truth, which should be the prime object of a judicial

- A investigation, and because, if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own.
- B [8] That the presumption of resulting trust operates only where there is absent evidence as to the true intention of the parties is borne out by what Lord Upjohn said in *Pettitt v. Pettitt* [1970] AC 777, 814:
- C ... **in the absence of evidence to the contrary** if the property be conveyed into the name of a stranger he will hold it as trustee for the person putting up the purchase money (emphasis added.)
- D [9] The position is no different in our jurisdiction as demonstrated by the following passage by SK Das' work "*The Torrens System in Malaya*" where the learned author says this (at p. 192):
- E A resulting trust arises when a person purchases property in the name of another **not intended as a gift**. (emphasis added.)
- F [10] We therefore approve of the following statement of the law by Gabriel Moss QC (sitting as a Deputy High Court judge) in *Kyriakides v. Pippas* [2004] EWHC 646 (Ch):
- G Where there is no declaration, the court puts itself in the position of a jury and considers all the circumstances of the case, so as to arrive at the purchaser's real intention: *Snell* para 9-15. It is only where there is no evidence to contradict the presumption that it will prevail: *Ibid*. The case-law has developed in such a way that even 'comparatively slight evidence' will rebut the presumption and a:
- H less rigid approach should also be adopted to the admissibility of evidence to rebut the presumption of advancement' *Lavelle v. Lavelle* [2004] EWCA Civ 223 (CA) per Lord Phillips MR at para 17.
- I I suspect the position we have now reached is that *the courts will always strive to work out the real intention of the purchaser and will only give effect to the presumptions of resulting trust and advancement where the intention cannot be fathomed* and a 'long-stop' or 'default' solution is needed. (emphasis added)
- I [11] We may add that while the presumption of advancement forms no part of Indian law there is a most useful explanation of the English position to be found in *Sahdeo Karan Singh v. Usman Ali Khan* AIR [1939] Patna 462:

In England, however, if the conveyance or transfer is made not to a stranger but to the wife or child of the person who provided the consideration, then no resulting trust arises. **If the transaction is wholly unexplained**, the law in England presumes an intention to benefit wife or child. In India no such rule exists. (emphasis added)

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It is noteworthy that it is the absence of an explanation that gives rise to the presumption.

[12] We now turn to the evidence from which the real intention of the plaintiff may be deduced. First, although the plaintiff provided the purchase price he not only registered the property in the defendant's name, but also permitted her to occupy the house. If he only intended the defendant to be his mistress without receiving any proprietary benefit from the relationship he could have easily rented the premises and installed her there. After all, he was a very wealthy man and could have easily afforded it. His conduct in this respect points towards an intention to make a gift of the house to her. Second, the plaintiff allowed the defendant to deal with the house as if she was the beneficial owner. He permitted her to deal with the appropriate authorities to have water and electricity supply connected to the house. He allowed her to pay the annual quit rent and assessment of the said property from 1981 and never reimbursed her. He obviously intended the defendant to have the beneficial ownership in the house for otherwise he would not have met these outgoings. He permitted her to apply for approval from the local authority to renovate the house. By his acts and omissions he obviously encouraged the defendant to believe that she was not merely the owner of the house at law but also in equity. Third, at no time did the plaintiff inform the solicitors who attended to the purchase and transfer that the defendant was the mere nominal owner of the house and that he was the true beneficial owner. If he had not intended a gift the easiest thing for him to have done was to have a declaration of trust drawn up. Fourth, and perhaps most important of all, is the reason provided by the plaintiff for purchasing the house in the defendant's name. He said he meant it as an investment. And he bought it in the defendant's name because he was advised by someone called Chan Meng – an electrical contractor – that as a foreigner the plaintiff could not own property in Malaysia. But it appears from the evidence that at the date of the purchase the defendant was a foreigner as well. We must say at once that the plaintiff's explanation when viewed

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- A against the objective facts and the probabilities of the case defies credulity. Here we have a seasoned businessman who has recourse to legal advice but chooses to act on the say so of an electrical contractor. If he as a foreigner could not own the house then neither could the defendant who was a foreigner as well at
- B the material time. The other point is this. It is highly improbable that the plaintiff – a multimillionaire – would choose to make an investment in a house worth a mere RM61,000 by having it registered in the name of his mistress and the mother of his child. It is unfortunate that the High Court however turned an
- C indulgent eye upon evidence that called for, if not demanded, for the closest of scrutiny.

- [13] It was argued on the plaintiff's behalf in response to the appeal that each of the circumstances was insufficient to support
- D a probable inference of a donative intention on his part. Now, that may well be true although it must be said that each individual strand of the evidence in this case is peculiarly strong in itself. But the important feature of circumstantial evidence is not the individual strand but the combined strength when all the strands are put together. As Lord Cairns said in the *Belhaven & Stenton*
- E *Peerage Case* [1875] 6 App Cas. 279:

- My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so
- F feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.
- G [14] Take a step back and view the united force of the evidence and the probabilities of the case. Here you have a defendant who for many years agreed to all that the plaintiff (whom for all practical purposes regarded as her husband) asked of her. He wanted her to be his mistress. She agreed. He wanted her to
- H move to Johor. She did. He asked her to undergo a sham marriage. She did that as well. She bore him a child. Against this background it is highly likely that after about ten years into the relationship he wanted her to have at least a roof over her head: for all that she had done for him. And that is probably why he
- I purchased the house in her name. It was not palatial. It was a modest home. It gave her some security. That is what he probably intended that she should have. And there is nothing unusual in

this. Unfortunately the High Court did not sufficiently direct itself to the salient facts. It did not sufficiently direct itself to the probabilities of the case. Nor did it test each party's case against those probabilities. As such we are satisfied that this is a case in which there was clearly a want of judicial appreciation of the evidence by the trial court thereby warranting appellate intervention.

[15] Now, even accepting the learned judge's approach to be correct, we are satisfied that the presumption of resulting trust in the present case has been rebutted by the evidence we have already alluded to. In this context we would refer to the article by William Swadling, "*A new role for resulting trusts?*" 16 Legal Studies 133 in which the learned writer argues that the presumption of resulting trust may be rebutted by evidence of any intention inconsistent with such a trust, and that it is unnecessary to bring home an express donative intent on the part of the purchaser to rebut the presumption. Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 accepted this view and we would do likewise. What it then comes to is this. Very slight evidence is required to rebut the presumptions of resulting trust and advancement. But as we have demonstrated, the evidence placed before the High Court was of a compelling nature and not merely slight.

[16] Strictly speaking, what we have said thus far should be sufficient to conclude the appeal in the defendant's favour. But there is an additional ground on which, in our judgment, the defendant should succeed.

[17] One reason for the learned trial judge's refusal to find a gift in the defendant's favour was that she was a mistress and that therefore the presumption of advancement did not apply in her favour. This is what he said on the point:

The case of *Soar v. Foster* [1858] 4 K & J 152 is more appropriate and applies squarely to the factual matrix of the present case. The principle that can be distilled from this case is that there is no presumption of a gift where a man buys property and has it conveyed into the name of his mistress.

[18] Now, *Soar v. Foster* [1858] 70 ER 67 was, as the report indicates, decided in 1858. By the common law and rules of equity of England as they stood in 1858, a woman was nothing more than a mere chattel. She had no separate estate. That did

A not come until the Married Women's Property Act 1882. Women did not have the vote. And it was in that social context that *Soar v. Foster* was decided. However, in *Dharmaratna v. Dharmaratna* [1939] 1 LNS 21, Terrell Ag CJ at first instance doubted whether *Soar v. Foster*:

B would now be followed in England, and in any case I am satisfied that such a rule would be quite unsuitable to the Asiatic inhabitants of the Federated Malay States. I find, therefore, that the relationship of the parties in this case raises a presumption that the transfer into the name of the plaintiff was intended as a settlement.

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On appeal, the Court of Appeal of the former Federated Malay States left the issue open because there was evidence to support a donative intent on the part of the purchaser. Hence, McElwaine CJ (SS) said:

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Whether *Soar v. Foster* 4 Kay & J 152 would or would not be held today to be too strict it is not necessary to decide. I would, however, observe that in *In re A Policy of the Scottish Equitable Life Assurance Company* [1902] 1 Ch 282 there was no sort of obligation owing by Mr. Sanderson to Miss Stiles at the time the policy was taken out. There are several cases in which bonds to provide for mistresses have been held to be valid – *Turner v. Vaughan* 2 Wills 339 95 ER 845, *Nye v. Moseley* 6 B & C 133, *Re Vallance* 26 Ch. D. 353, *In re Abdy* [1895] 1 Ch 455. These were not cases of resulting trusts, they depended upon whether the real consideration was future immorality. Bathurst J in *Turner v. Vaughan* (*supra*) said “when a man is bound in honour and conscience, God forbid, that a Court of Law should say the contrary; and wherever it appears that the man is the seducer, the bond is good”. Whether the same broadminded principle should not in equity defeat the theory of a resulting trust and be taken to indicate that the purchaser intended the conveyance to be a provision for a woman for whom in honour and conscience he ought to provide it is unnecessary now to decide because apart from this point there was evidence from which the learned trial Judge could properly find that a gift for the benefit of the plaintiff was intended.

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[19] In *Cooke v. Head* [1972] 2 All ER 38 Lord Denning MR stated the modern position:

I So the courts, under the guidance of the House of Lords, have had recourse to the final way, the law of trusts. It is now held that, whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute

a constructive or resulting trust. The legal owner is bound to hold the property on trust for them both. This trust does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. It applies to husband and wife, to engaged couples, and to man and mistress, and may be to other relationships too.

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The particular case of man and mistress came before the Court of Appeal in *Diwell v. Farnes* [1959] 2 All ER 379. The court was divided in opinion. The majority thought that a mistress was not in the same position as a wife. She could recover her actual contributions to the purchase price, but could not claim any part of the windfall on resale. Willmer LJ approached the case much as we approach cases between husband and wife. He would have given the mistress one-half. His approach is more in accord with recent development.

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[20] Learned counsel for the plaintiff urged us to continue to apply *Soar v. Foster* because of s. 3 of the Civil Law Act 1956. We must disappoint him by making it clear that we do not wish to propel our jurisprudence into the Middle Ages. It must not be forgotten that the development of our jurisprudence is in our hands. See, *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57. Nor must it be forgotten that the principles of equity are not etched in stone tablets, inflexible and impervious to the passage of time and the modernity of society. Take *Soar v. Foster* itself. Until that case it was the view of Equity judges that the presumption of advancement did not apply to illegitimate children. But the Court of Chancery in *Soar v. Foster* extended the application of the presumption to illegitimate children. We think that the presumption should now be extended to mistresses. Indeed, it is our considered judgment that *Soar v. Foster* is so far as it refused to extend the presumption of advancement to mistresses is no longer good law and the views of Terrell Ag CJ in *Dharmaratna v. Dharmaratna* are to be preferred.

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[21] For the reasons already given the appeal was allowed and the appropriate consequential orders made.

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